Pursuant to Sup. Ct. R. 15.6, Petitioner, St. Francis Medical Center, respectfully submits this Reply to address an argument first raised in a footnote to the Secretary's 2/28/95 Brief in Opposition. The argument raised by the Secretary in this footnote is not only wrong, but is of central importance to this case.

At note 6 of her Brief, the Secretary sets forth a description of *Methodist Hospitals v. Sullivan*, 799 F. Supp. 1210 (D.D.C. 1992), *rev'd on other grounds, Administrators of Tulane Educational Fund v. Shalala*, 987 F.2d 790 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 740 (1994) (hereinafter "*Tulane*"). The two sentences in question from the Secretary's Brief state as follows:

> In that case, the provider's cost report for a post-base-year period was reopened pursuant to special statutory provisions, and the base-year costs were recalculated only for purposes of reviewing the reimbursable costs for the reopened cost year. The decision [sic: regarding] the latter cost report reopening was then appealable to the PRRB and the district [sic: court] in the same manner that an original decision on a cost report may be appealed.

See Secretary's 2/28/95 Brief at 9 n.6. This argument is not only inaccurate, but is so inaccurate that it is difficult to comprehend how these two sentences could appear in the Secretary's Brief.

The *Tulane* case did *not* involve an appeal of a post-base-year cost report. Rather, the *Tulane* case involved an appeal of a re-audit adjustment to 1984 "base year" costs. For example, with regard to the "lead" hospital ("Methodist"), the District Court opinion makes crystal clear that the appeal in question involved the re-audit of "Methodist's 1984 cost report." 799 F. Supp. at 1212. The 1984 cost report was the statutory "base period" which was used to determine the "per resident amount" which was the "average amount recognized as reasonable during [the] base period that began in fiscal year 1984 . . . ." 799 F.

Supp. at 1211-12. The amount of the adjustment in issue as a result of the re-audit of the 1984 base year for Methodist was $893,841. *See* 799 F. Supp. at 1212 ("BCBS [the fiscal intermediary] determined that Methodist's allowable GME costs were $893,841 less than the amount determined by the [prior] 1986 audit of Methodist's 1984 cost report"). However, this adjustment amount involved no reimbursement in the base year because the hospital "did not have to refund the difference for 1984 . . . ." 799 F. Supp. at 1212. Rather, this adjustment to the 1984 costs in the amount of $893,841 merely impacted *future* cost years. *Id.* But none of these *future* cost years was on appeal. Rather, the hospital appealed from the notice of the re-audit adjustment related to the 1984 cost year. *Id.* at 1212-13. This appeal was filed pursuant to the 180-day provision set out in the Secretary's regulations. *Id.* at 1212 ("Hospitals, if dissatisfied with the intermediary's determination, have 180 days from the date of notice to file an appeal with the Provider Reimbursement Review Board . . . ."), *citing* 42 C.F.R. § 413.86(e)(1)(v).

In sum, the District Court opinion in *Tulane* makes abundantly clear that the cost report on appeal in that case was not a "cost report for a post-base-year period," as stated at note 6 of the Secretary's 2/28/95 Brief. The Court of Appeal's *Tulane* decision is equally clear on this point. *See* 987 F.2d at 793-94 (referencing the same $893,841 in issue from the 1984 Methodist cost report and similarly stating that the 1984 "reaudits did not result in any recoupment of reimbursements for 1984 *but only affected the base period calculation*") (emphasis added).

In order to ascertain with absolute certainty that *Tulane* involved an appeal of the base year (and not an appeal of a post-base-year cost report), on March 8, 1995, the undersigned counsel contacted Mr. Ronald Sutter, counsel for the provider in *Tulane*. Mr. Sutter confirmed that *Tulane* involved an appeal of the base year, not an appeal of a post-base-year cost report,

and Mr. Sutter supplied the undersigned counsel with copies of pages 110-113 from the Third Circuit Joint Appendix in *Tulane*. Those pages comprise (i) the notice sent by the fiscal intermediary to the provider, and (ii) the provider's notice of appeal to the PRRB. With the knowledge and consent of Mr. Sutter, these documents have now been "lodged" with this Court in this case, *i.e.*, Sup. Ct. Docket No. 94-1122. If the Court wishes to review these materials, the Court will see immediately that the appeal to the PRRB by Methodist was an appeal from a notice regarding the 1984 base year — setting forth the Secretary's determination of the hospital's "average per resident amount . . . for the period ended December 31, 1984" — not an appeal of a post-base-year cost report.[1]

In short, the *Tulane* case did not involve an appeal of a post-base-year cost report. Rather, that case involved a straightforward appeal of an adjustment to base year costs pursuant to the procedure delineated by the Secretary in 42 C.F.R. § 413.86. With regard to Methodist, a *downward* adjustment in the amount

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[1] In addition, if this Court wished to take judicial notice of the briefs submitted to it in connection with the *Tulane* Certiorari Petition, *exactly* the same conclusion would result — both the Petitioner and the Secretary knew that the re-audit of the 1984 cost report was the issue on appeal, *not* a post-base-year cost report, and further knew that no reimbursement amounts in the base year were at issue. *See, e.g.*, Sup. Ct. Docket No. 93-507, Certiorari Petition at 7. *See also* Sup. Ct. Docket No. 93-507, Secretary's Brief in Opposition at 6 and n.3 (referencing the $893,841 at issue from Petitioner's 1984 cost report and further noting that "no recoupment action was taken" regarding the 1984 cost report). Indeed, in her *Tulane* Brief submitted to this Court, the Secretary appeared to argue that a re-audit of the base year costs was the *exclusive* method of proceeding because the Secretary "believed" that there was no provision in the law for "correcting" any base-year errors "later," *i.e.*, in post-base-year appeals. *See* Sup. Ct. Docket No. 93-507, Secretary's Brief In Opposition at 5 ("The Secretary believed that 'the provisions of section 1886(h) of the Act would seem to require that we correct these discrepancies in the base period since there is no provision in the law for correcting them later'"), *citing* 53 Fed. Reg. 36,593 (1988). Copies of these materials are included in the "lodged" materials referenced in the text.

of $893,841 was implemented by the Secretary, but that adjustment concededly had no impact on reimbursement in the base year. Rather, it impacted reimbursement only in future years. Here, of course, St. Francis is seeking an *upward* adjustment to base year costs in an amount "in excess of $700,000." *See St. Francis I*, 962 F.2d at 1113 (Sup. Ct. App. at A-26). Again, it is conceded that this adjustment will have no impact on reimbursement in the base year, but it will impact huge amounts of reimbursement in future years. Thus, from a *jurisdictional* standpoint, *Tulane* and this case are the *same*. If the *Tulane* case had $10,000 or more in controversy, the instant case does as well. Accordingly, the panel in *St. Francis I* was in error when it ruled as follows:

> § 1395oo(a) limits a provider's request for a Board hearing to claims that could result in reimbursement of $10,000 or more due the provider *under the cost report in dispute.*

St. Francis I, 962 F.2d at 1114 (Sup. Ct. App. at A-29) (emphasis added).

By far the most significant aspect of the *Tulane* appeal is that the parties did not merely stumble upon the PRRB appeal process by accident. Rather, the GME appeal process was carefully constructed by the Secretary in 1989. *See* 42 C.F.R. § 413.86(e)(v) (Sup. Ct. App. at A-87). Moreover, the Secretary first constructed and then implemented the GME appeal process during the same period of time (1989-present) that she has been arguing — in *this* case — to the PRRB, the District Court, the Third Circuit and now this Court, that St. Francis cannot appeal the Secretary's denial of the request by St. Francis for a base year adjustment, assertedly because there is no amount in controversy.

The panel decision in *St. Francis I* and the GME appeal process crafted by the Secretary in § 413.86(e)(v) are in complete and total conflict. Tellingly, even though St. Francis argued at length that 42 C.F.R. § 413.86 was wholly at odds with

St. Francis I (see Petition for Certiorari at 16-21), the Secretary has made no attempt to deal with § 413.86 in her 2/28/95 Opposition Brief. Indeed, the Secretary failed even to cite § 413.86. St. Francis submits that the Secretary failed to deal with § 413.86 because she cannot do so — § 413.86 demonstrates conclusively that *St. Francis I* should be reversed.

Respectfully submitted:

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